KONG SIANG NG v. PUBLIC PROSECUTOR

[A.Cr.J. (Williams J.) September 2, 1965]

[Sibu — Criminal Appeal No. 7 of 1965]

Penal Code, ss. 280 and 304A — Collision Regulation (Ships) Statutory Instrument, 1953 — Navigating a vessel in a negligent manner — Standard of negligence — Whether necessary to prove criminal negligence.

This was an appeal against the conviction of the appellant for the offence of navigating a vessel in a negligent manner so as to endanger human life thereby failing to comply with rule 25(a) of the Collision Regulation (Ships) Statutory Instrument, 1953, an offence under section 280 of the Penal Code. It was argued on appeal that the facts did not justify a conviction for criminal negligence.

Held: on the facts the appellant was negligent and his negligence was of a kind which endangered human life and he was therefore rightly convicted.

Cases referred to:—

(1) *Mohamed Yusof* v. *Public Prosecutor* [1962] M.L.J. 311.

(2) *Public Prosecutor* v. *Peter Gilbert Mills* (1955), unreported Brunei Criminal Appeal No. 3 of 1955.

(3) *Woo Sing* v. *Regina* [1954] M.L.J. 200.

(4) *Anthonysamy* v. *Public Prosecutor* [1956] M.L.J. 246.

CRIMINAL APPEAL.

Lee Hun Hoe J. read the judgment of —

Williams J.: This is an appeal from a decision of the learned magistrate at Sibu. By that decision the appellant was convicted of the following offence:—

That on or about the 13th day of May, 1964 near Rantau Dilang in the Rejang river while acting as master of M. V. Sin Kapit No. 2 you did navigate the said vessel in a negligent manner so as to endanger human life in that you failed to comply with rule 25(a) of the Collision Regulation (Ships) Statutory Instrument 1953 (No. 1557 of 1953) and thereby committed an offence punishable under section 280 of the Penal Code.

The essence of the rule quoted is that ships when navigating a narrow channel are required to keep to that side of midchannel which lies on their starboard bow.

The facts of the case briefly are that in the early hours of the morning in question the appellant was navigating a passenger carrying launch, the *Sin Kapit No. 2* upriver from Kanowit towards Kapit. At Rantau Dilang the launch crossed over to the other bank and discharged a passenger. Then instead of returning to her proper side of the channel the appellant continued to navigate upriver, at a speed of some 2½ knots, some 90′ from the true right bank. The reason for doing this as given by the appellant was that a heavy mist had developed, or rather thickened, and as he could not see the opposite bank he felt it safer to continue on the 'wrong' side.

Unfortunately at about this time a launch, the *Kong Hoe Lee*, also carrying passengers was coming in the opposite direction on its correct side of the channel.

Perhaps not surprisingly a collision occurred. The *Kong Hoe Lee* managed to beach before sinking and the passengers were taken aboard the *Sin Kapit No. 2*.

There was some evidence of contributory negligence but on the facts the learned magistrate held, the accident apart, that the appellant had navigated his vessel in a negligent manner so as to endanger human life.

The grounds of the appeal were two fold but were argued as one. That argument in effect was that the magistrate had applied a civil rather than a criminal standard of negligence and that the facts did not justify a conviction for criminal negligence.

The argument as to the distinction that exists between criminal and civil negligence was based in truth upon a single passage from *Ratanlal's* Law of Crimes 20th edition at p. 655 which reads as follows:

"The Orissa High Court has held that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

I am a little surprised that reliance should have been placed solely upon that passage and that no reference was made to the many cases in which this matter has been considered particularly the decision of Adams J. in *Mohamed Yusof* v. *Public Prosecutor*.[1]

The matter is not without some importance and a little more assistance from both parties would have been appreciated. The respondents were however perhaps a little handicapped by the fact that the grounds of appeal did not intimate in any way that this was the subject of the 'error in law' that was to be argued. It would be helpful if in future appellants did so particularise their grounds of complaint.

Be that as it may I have had cause to look at the various decisions upon this point as given in both the courts of Malaya and Singapore. I have done so with caution as the law in Sarawak is in truth governed by a decision of the Court of Appeal of Sarawak, North Borneo and Brunei, as it then was, in *Public Prosecutor* v. *Peter Gilbert Mills*.[2] It was following that decision, albeit given in respect of the Penal Code of the State of Brunei, that section 304A of the Penal Code of Sarawak was amended to

incorporate the concept of 'criminal' or 'gross' negligence. That section now reads as follows:

"CAUSING DEATH BY GROSS NEGLIGENCE.

304A. (1) Whoever causes the death of any person by any act which is so negligent as to amount to a reckless disregard for human life, shall be guilty of an offence: Penalty, imprisonment for fifteen years, with or without a fine.

(2) Any person charged with an offence against this section may, subject to the provisions of section 156 of the Criminal Procedure Code, be convicted of any minor offence involving negligence whether or not any notice of intention to prosecute for such offence required by any written law to be served on a person accused of such offence has been served."

There can be little doubt that the decision in *Mill's* case was more in line with the reasoning in *Woo Sing and Sim Ah Kow* v. *Regina* (3) and with that of Buhagiar J.'s dicta in *Anthonysamy* v. *Public Prosecutor* (4) than with those decisions which would purport to distinguish between any concept of civil and criminal negligence.

Thus, section 304A apart, the question is was the appellant negligent in doing what he did and was that negligence of a kind which endangered human life.

Here I am satisfied that the facts amply proved those two points and that they were fully appreciated by the trial magistrate. I therefore dismiss this appeal.

Appeal dismissed.

M. S. ALLY & CO. LTD. v. CALHAEM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) September 3, 1964]

[K.L. — Federal Court Civil Appeal No. 34 of 1964]

Practice and Procedure — Application to strike out statement of claim — Attachment order made by court under judgment subsequently set aside — Whether damages can be sought for wrongful attachment — R.S.C., 1957, O. 25 r. 4.

The appellant had obtained judgment against the respondent for the sum of $753.37 and costs. This judgment was subsequently set aside on the ground that the summons had not been served on the respondent but on some other person. In the meantime the appellants had obtained an order of attachment of money owed to the respondent by a bank. This attachment was subsequently withdrawn a month before the judgment in respect of which it was issued was set aside. The respondent brought an action against the appellant for damages for wrongful attachment. The appellants thereupon took out a summons asking that the statement of claim be struck out and the action be dismissed. This application was dismissed ([1964] M.L.J. 289) and the appellants appealed.

Held: on the face of the pleadings the respondent did not have any cause of action whatsoever, as the attachment when issued was based on a good and unsatisfied judgment and therefore the statement of claim should have been struck out and the action dismissed.

Case referred to:—

(1) *De Medina* v. *Grove* 10 Q.B. 172, 177,

FEDERAL COURT.

P. J. Mooney for the appellant.

A. D. Rajah for the respondent.

Thomson L.P.: On 21st February, 1961, the present appellants obtained judgment against the respondent in the magistrate's court at Kuala Lumpur for a sum of $753.37 and costs. That judgment was not satisfied but on 28th November, 1963, it was set aside on the ground that the summons therein had not been served upon the respondent but on some other person. In the meantime, however, the appellant had obtained an order for the attachment of money owed to the respondent by a local bank. On 21st September, 1963, in pursuance of that Order the bailiff of the court attached a sum of $359.22. The attachment was withdrawn on 23rd October, 1963, that is to say a month before the judgment in respect of which it has issued was set aside.

On 3rd January, 1964, the respondent commenced the present proceedings against the appellants in the High Court. The endorsement on the writ was as follows:—

"The plaintiff's claim against the defendant is for damages for wrongful attachment by the defendant of the plaintiff's moneys in the hands of the Hongkong & Shanghai Banking Corporation, Kuala Lumpur, together with interest and costs."

The material portion of the statement of claim was as follows:—

"The attachment of the plaintiff's moneys with the said bank was wrongful and as a result of such wrongful attachment the plaintiff has suffered loss of reputation and had been wrongfully deprived of the use of his moneys with the said bank and thereby suffered damages."

It is only necessary to add that there was no claim for any special damages.

On 6th February, 1964, the appellants took out a summons under Order 25, rule 4, asking that the statement of claim be struck out and that the action be dismissed. That application was dismissed and against the order dismissing it the appellants have now appealed.

I refrain from expressing any opinion as to whether the respondent may have any remedy of any sort against the appellants, though I suppose the appellants have already paid some penalty in the way of costs. The present appeal, however, is to be decided on the pleadings and on the pleadings only and on them (and no attempt has been made at any time to amend them) I cannot see that the defendants have any cause of action whatsoever.

On the pleadings at the time of the attachment, and right down to the time it was withdrawn there was in existence a judgment which on the face of it was a good